BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JANET E. REGIER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,053,660
KANSAS COSMOSPHERE & SPACE CENTER, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY CO.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the November 30, 2012, Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on March 22, 2013, in Wichita, Kansas.

APPEARANCES

Mitchell W. Rice, of Hutchinson, Kansas, appeared for the claimant. William L. Townsley, of Wichita, Kansas, appeared for respondent and its insurance carrier. Due to a conflict, Board Member John F. Carpinelli has recused himself from this appeal. Accordingly, E. Lee Kinch, of Wichita, Kansas, has been appointed as a Board Member Pro Tem in this case.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. A Notice of Attorney Fee Lien is on file with the Division. This matter was not addressed by the ALJ in the Award. However, at oral argument to the Board, Mr. Rice, the attorney for claimant, advised the Board that the dispute regarding attorney fees between his office and that of Mr. Matthew Bretz had been resolved and was no longer before the Board.

ISSUES

The ALJ found claimant met with personal injury by accident on February 9, 2009, and that the injury arose out of and in course of claimant's employment with respondent. The ALJ also found claimant provided timely notice of that accident to her employer and that claimant suffered a 50 percent task loss and 100 percent wage loss for a 75 percent permanent partial general (work) disability.

Respondent argues that the Award should be reversed and claimant denied compensation as claimant has not met her burden to prove she met with personal injury by accident arising out of and in the course of her employment with respondent. Instead, respondent contends claimant has a preexisting back condition that waxed and waned over the years and continues to wax and wane. Respondent argues claimant's purported work injury is nothing more than a period of transient pain that resolved back to levels consistent with her condition prior to her work with respondent. Respondent also contends that claimant failed to provide timely notice, as it was not notified of an injury until two months after the date of the accident and after claimant's employment had been terminated, leaving respondent no opportunity to investigate or provide medical treatment. In the event the Board finds claimant did suffer a compensable injury, respondent argues claimant should be found to have a 0 percent task loss combined with the 100 percent wage loss for a 50 percent work disability.

Claimant argues the Award should be affirmed.

The issues on appeal are as follows:

1. Whether claimant met with personal injury by accident, and whether that injury by accident arose out of and in course of her employment with respondent;

2. Whether claimant provided timely notice of her purported injury; and

3. Nature and Extent of claimant's impairment and/or disability.

FINDINGS OF FACT

Claimant began working for respondent as Director of Marketing on August 21, 2008. The job involved providing marketing, advertising, and public relations plans to implement for the Cosmosphere. Claimant was also responsible for trade shows and making sure educational opportunities were available for guests touring the building.

Claimant testified that on February 3, 2009, she was preparing packets of information for educational opportunities to be sent to companies and parents of home-schooled children. Claimant was putting those packets in boxes to be mailed. Claimant told her supervisor that the boxes were too heavy for her to lift onto a cart, take to the mail

service in the basement, put on a scale to weigh and put back on the cart. Claimant asked for help, but was told no help was available and she needed to quickly do the job. Claimant did the best she could. However, as she was lifting a box from the cart onto the scale she felt a fire shoot up her back. The box weighed 65 pounds. Claimant testified that she left the rest of the boxes on the cart for the mailman to put postage on, and then took the elevator back up to her office, even though she wasn't supposed to, and immediately reported the incident to her supervisor, Marisa Honomichl.

After reporting the incident, claimant testified that she was told that there was not any time for her to take off and she should go to her office, get better in a hurry and get back to work.[1] Claimant continued to work, but ended up leaving early because it was difficult for her to sit in her chair. From then on, claimant had trouble walking and had pain in her lower back and legs. Claimant did not miss any work because of her injury.

Claimant sought treatment on her own with a chiropractor, because she had a friend with a similar injury who thought it might help. She received her first chiropractic treatment on February 13, 2009, with Jolene Yoder, D.C. Claimant reported to Dr. Yoder that she was lifting boxes that were too heavy and experienced pain in her back. Range of motion testing proved to be normal at that time. Claimant had not been given any workers compensation paperwork to fill out, so when she met with Dr. Yoder, claimant did not indicate on her paperwork that her back was a workers compensation issue or due to a work-related accident. Although Dr. Yoder's February 13, 2009, office note discusses an onset 10 days before, when claimant lifted a box, claimant also discussed periodic back pain for the past 25 years after she slipped while getting out of a swimming pool. Dr. Yoder's notes identify pain in claimant's low back and right lower extremity.

When Dr. Yoder examined claimant again, on February 16, 2009, claimant reported improvement. This improvement continued through her February 18, 25 and March 2, 2009, visits. By the March 2 visit, claimant's pain had been reduced to a 2 on a scale of 1-10. On March 23, 2009, claimant reported increased pain of an 8 out of 10, due to activities of daily living (ADL). Claimant identified being on her feet on concrete for long periods and going up and down stairs as the primary aggravations. Dr. Yoder's office notes recorded varying results over the next several visits, with claimant improved on March 25, worse on March 27, and improved on April 1, 2009. The March 27, 2009, note discusses pain when claimant twisted wrong getting out of the shower that morning, with sharp, stabbing pain in her right lower back/hip. The stipulated records from Dr. Yoder's office end on April 1, 2009.

Claimant met with Dr. James W. Siler, her Medicare physician, in April 2009, after her treatment with Dr. Yoder no longer provided her with any relief. Dr. Siler was initially treating claimant for diabetes when she reported her low back pain. An MRI was ordered

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[1] R.H. Trans. at 11.

and claimant was asked how she was injured. When claimant reported she was injured lifting boxes at work, she was told to file a workers compensation claim. Claimant was then referred to Dr. Jeffrey Thode at Same Day Care, the physician handling workers compensation issues. Claimant also met with Dr. Matthew Pouliot, who administered three lumbar epidural steroid injections and selective nerve root blocks at L2-3, the latter of which provided considerable improvement. Claimant was also treated by Dr. John Fan for pain management.

Claimant testified that the pain in her back is constant and she has good and bad days. She testified that as soon as she filed her workers compensation claim, her employment was terminated (April 19, 2009).[2] Claimant was released from Dr. Pouliot's care on June 17, 2009. She did not receive any other treatment until March 5, 2010, when she went to the Hutchinson Clinic for neck and shoulder pain. Claimant did not report pain in her legs and back at that time, but believed that was because the pain was blocked by the injections she had received.

In September 2010, claimant was asked to work at Meals on Wheels and thought she would be in the office doing computer work, but found the job involved a lot of kitchen work and handling trays of food. The job was more than she could handle and she quit after six months. She had been working 10 hours a month at $10 an hour. She previously testified to 10 hours a week, but corrected that. Claimant believes she stopped working for Meals on Wheels in February 2011.

Claimant denied having any significant injuries to her back for at least 10 years prior to February 2009. She did recall slipping while getting out of a hot tub 30 years ago. Claimant sought chiropractic treatment for several months after that incident. Claimant was told that she had a disk that was slightly out of place and was pinching her sciatic nerve. The chiropractic treatment at that time relieved claimant of her low back pain.

Claimant testified that she can no longer stand still and cook dinner without pain and can no longer sweep and vacuum her house, or carry laundry up and down stairs to the laundry room. Claimant's pain has gotten gradually worse since the accident in February 2009. She testified that she has been diagnosed with a herniated disk (arthritis or degenerative disk disease), but none of the doctors she has seen so far want to deal with it.

At the time of the regular hearing, claimant had been under the care of her primary care physician Dr. Janzen, at Hutchinson Clinic, for one year. However, claimant is not seeing Dr. Janzen for her back injury. The last treatment she had for her back was in 2010, when she received an injection with Dr. Stein. She had an adverse reaction and did

[2] Claimant believes she was wrongfully terminated.

not receive the other two injections that had been ordered. Claimant is currently taking cyclobenaprine, a muscle relaxant and hydrocodone, a pain reliever.

Claimant had only been living in Kansas for 6 months when her injury occurred. Before moving to Kansas claimant lived in California, where she was an avid tennis player, playing two to three times a week for three to four years. During that time she sought medical treatment for tennis elbow and also met with a chiropractor in 2008 for a muscle spasm in her low back. The cause of the spasm was unknown. Claimant's complaints, treated by Donald Myren, D.C., of Temecula, California, included her low back and left lower extremity. From the records in evidence, claimant was seen by Dr. Myren on three occasions in March and April, 2008.

It has been three years since the accident and claimant continues to have back pain. She alleges there were issues that were never addressed by some of the physicians, especially Dr. Stein, who refused to listen to her complaints of pain in her hip, down through her groin and down her leg. Claimant testified that Dr. Stein told her to stop self-diagnosing. He saw no reason for her to have back surgery.

Claimant denies reporting that her back pain began over a couple of days after the accident. She had pain immediately after picking up the box. Claimant testified that when she puts pressure on her leg she has pain that comes and goes.

Steven Birdsall, controller for the Kansas Cosmosphere, testified that, along with his financial duties, he oversees Human Resources and insurance related issues. Mr. Birdsall identified claimant as a member of the executive staff. He noted claimant and her supervisor, Marisa Honomichl, vice president of marketing and development, had experienced friction between them. This friction prompted Ms. Honomichl to give claimant a February 20, 2009, verbal warning about the proper way to discuss issues with the staff.

On April 17, 2009, the decision was made to terminate claimant's employment. The reasoning for the termination was two-fold. First, claimant's attitude was horrible and showed when she worked with other departments and the public; and second, she was unable to adapt and alter her plan when change was required.

Mr. Birdsall testified that when employees are terminated, an exit interview is conducted to obtain feedback on any issues they may have had with any staff or supervisor. He testified that up to the day of claimant's exit interview, she had not reported any work-related injury.

Claimant met with board certified neurological surgeon Paul S. Stein, M.D., on July 26, 2010, for a consultation. Claimant appeared with complaints of back and bilateral extremity symptomatology. He opined that the distribution of claimant's discomfort is more consistent with higher degenerative change and there is a possibility of contribution from degenerative arthritis in the hips. Dr. Stein testified that claimant indicated she had been

doing well after a series of injections, until a month and a half before this visit when she hurt her back working in her yard. Dr. Stein opined claimant had degenerative disc disease at L1-L2 & L5-S1 and possible radicular irritation. He ordered x-rays of the lower back, with flexion-station and oblique views; x-rays of the hips; an MRI scan of the lower back; and EMG/NCT tests of both lower extremities.

On August 9, 2010, Dr. Stein noted that the EMG/NCT of the lower extremities was negative, x-rays of the hips reflect mild to moderate degenerative arthritis on the left and mild on the right and the MRI of the lumbar spine was stable compared to a previous study. Claimant's biggest area of discomfort was across the lower back bilaterally, with pain radiating around the hips and into the anterior thighs. Claimant was sent to Dr. Fan for additional lumbar epidural injections.

Claimant met with Dr. Stein again on March 7, 2011. Dr. Stein noted that the additional injections he recommended had not been administered because insurance would not authorize the procedures. For a moment he considered surgery as a treatment option, but ultimately felt he needed to find the origin of claimant's pain first. So to determine the origin of the pain, and disk degeneration, Dr. Stein recommended a discography and myleogram/CT scan. He also recommended L1-L2 transforaminal epidural injections bilaterally. He noted claimant was working 20 hours a month at this time.

On March 30, 2011, Dr. Stein noted claimant had one lumbar injection with some benefit for a few days, but now has severe right lower extremity pain. He decided to proceed with the lumbar myleogram/CT scan and cancel the second injection. This was considered a precursor to possible surgery.

When Dr. Stein met with claimant on April 26, 2011, claimant continued to have pain. The myleogram/CT scan failed to show any nerve root compression, but did reveal degenerative disk disease at L5-S1. Claimant was given a prescription for one month of physical therapy, at her request. Claimant was not working at the time of this visit. The option for surgery was taken off the table at this time.

By June 9, 2011, claimant reported being 60 percent improved after physical therapy. An additional month of physical therapy was prescribed, and claimant was sent for a Functional Capacity Evaluation (FCE). The FCE was conducted on July 19, 2011.

On July 25, 2011, Dr. Stein opined claimant was at maximum medical improvement and assigned a 5 percent body as a whole permanent partial impairment of function to claimant under DRE lumbosacral category II. Claimant was instructed to follow the restrictions from the FCE. When asked the source of claimant's impairment, Dr. Stein stated that there may have been more than one factor involved. The original injury, he determined, was more important. Her complaints at the time he saw her on July 26, 2010, may have been the result of the epidural steroids wearing off.

Claimant met with vocational expert, Robert W. Barnett, Ph.D., via telephone, on August 17, 2011. Dr. Barnett determined that claimant had performed 14 tasks during the 15 years before her accident with respondent. Dr. Barnett opined that claimant's age may be a factor in her ability to obtain employment. Dr. Stein found, after reviewing the task list of Dr. Barnett, that claimant had a 50 percent task loss, having lost the ability to perform 7 out of 14 non-duplicated tasks.

Claimant met with Steve Benjamin for a vocational assessment on February 15, 2012. Mr. Benjamin opined claimant should be able to re-enter the open labor market.

At respondent's request, claimant met with board certified family practitioner John F. McMaster, M.D., for an examination, on February 29, 2012. Claimant presented with constant pain in her low back and left hip that radiated to both legs with occasional involvement of her left foot. Dr. McMaster determined that claimant's pain pattern was consistent with radiculopathy and noted claimant was being medically treated with prescription narcotics. He also indicated that claimant's condition predated the accident and noted it continued to change after the accident. Claimant reported that her pain was worse in the morning when she woke up and improved during the day. She also reported worse pain with walking, sitting for too long, bending and lifting, carrying, kneeling, crossing her legs and climbing stairs. She reported being able to lift up to ten pounds on an occasional basis and she could sit for up to 30 minutes at a time.

Claimant presented to Dr. McMaster with no evidence of distress. She had the ability to flex her head and neck. Examination of her extremities revealed they were intact and functioning, with active and passive range of motion of the major joints including the shoulders, elbows, wrists, hips, knees and ankles within normal limits, with the exception of reported left hip pain.

Dr. McMaster was provided extensive medical records detailing claimant's past complaints and treatments. When claimant was being treated by Dr. McKee in April 2009, she was diagnosed with degenerative disk disease at L1-2 and L5-6 with right side pain. Claimant received several injections and nerve root blocks on the right with Matthew D. Pouliot, D.O., of the Hutchinson Clinic. Medical records indicated claimant had almost 100 percent resolution of her back and leg pain on June 17, 2009.[3] Claimant then appeared in the office of John G. Fan, M.D., also of the Hutchinson Clinic on March 10, 2011, with pain in her left low back and into her left lower extremity. Claimant described the pain as the same as on the right from "last year".[4]

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[3] McMaster Depo., Ex. 2 at 3 (Dr. McMaster's Feb. 29, 2012, report).

[4] *Id.*

Dr. McMaster opined that claimant has historical and objective findings consistent with age-related and co-morbid medical conditions involving multiple body parts including the lumbosacral spine and hips. He went on to state that, with no verifiable objective medical findings, he was not able to determine whether claimant's pre-existing medical condition was exacerbated as a result of performing her sedentary job tasks, but it was consistent with an occupational aggravation. Based upon his findings, Dr. McMaster concluded that the transient occupational duties performed in the course of claimant's employment did not result in any permanent alteration or derangement to claimant's pre-existing low back bony or soft tissue pathoanatomy. He could find no new occupational injury to the low back or left lower extremity. In his opinion, the occupational occurrence on February 3, 2009, resulted in transient low back pain which had resolved.

Dr. McMaster diagnosed claimant with osteoarthritis, non-occupational in origin, and lumbosacral spondylosis without loss of motion segment integrity or radiculopathy. He found claimant to be at maximum medical improvement and assigned a 3 percent permanent partial whole person functional impairment related to claimant's occupational activities on or about February 3, 2009. He does not believe that claimant is permanently and totally disabled. Finally, Dr. McMaster felt claimant had not lost any task performing abilities with respect to the performance of usual and customary activities that encompass sedentary job tasks.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-501(a) states:

> (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record

Claimant testified to the particulars of an accident which occurred while she was performing the duties of her job with respondent. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.[5] There was testimony to contradict claimant's allegations that she lifted 65 pound boxes, but none to rebut the onset of pain while she was lifting the boxes, regardless of the weight. The Board finds claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent. It is

[5] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

acknowledged the medical evidence is confusing at times. But not to the point that it defeats claimant's testimony.

Both Dr. Stein and Dr. Yoder describe incidents where claimant's pain was increased while performing activities outside of work. Yet, neither testified to a permanent worsening of claimant's condition as the result of those apparent temporary exacerbations. The Board finds neither incident resulted in a permanent injury to claimant above that experienced on February 3, 2009.

K.S.A. 2000 Furse 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant testified that she told her supervisor, Marisa Honomichl of the incident immediately upon returning to the office. Ms. Honomichl did not testify in this matter making claimant's testimony uncontradicted and persuasive on the issue of timely notice.

K.S.A. 2000 Furse 44-510e states in part:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[6]

Both Dr. Stein and Dr. McMaster provided functional impairment rating opinions in this matter. The Board finds the opinion of Dr. Stein to be the more persuasive and awards

[6] K.S.A. 44-510e(a).

claimant a 5 percent whole person permanent partial functional impairment for the injuries suffered on February 3, 2009.

K.S.A. 2000 Furse 44-510e states in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[7]

After claimant's termination from respondent, her work experience was limited to only part-time very limited work. Claimant's work, at $10 per hour for only 10 hours per week was short lived and was less than substantial and gainful employment. The Board finds claimant has suffered a wage loss of 100 percent stemming from this accident. Dr. Stein's 50 percent task loss opinion is the only physician task loss opinion in this record. Dr. McMaster found claimant to have no permanent limitations and no task loss. But the Board finds the opinion of Dr. Stein to be the more persuasive and it is adopted for the purposes of this Award. In averaging the 100 percent wage loss and Dr. Stein's 50 percent task loss, the Board finds claimant has suffered a work disability of 75 percent. The Award of the ALJ is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has satisfied her burden of proving she suffered a work-related accident resulting in a permanent injury on February 3, 2009, resulting in a 5 percent whole person functional impairment. Claimant provided timely notice of this accident and any intervening increases in her symptoms resulted in no permanent worsening of her condition. Claimant's accident and injuries resulted in a permanent partial general disability of 75 percent. The Award of the ALJ is affirmed.

The ALJ approved the fee agreement between claimant and his attorney. This file contains no attorney fee agreement between claimant and her current attorney as mandated by K.S.A. 44-536(b). As such, there can be no approval of that fee agreement. Should claimant's counsel desire a fee be approved, he must file and submit this written contract to the Director for approval.

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[7] K.S.A. 44-510e.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated November 30, 2012, is affirmed, with the exception regarding the Board's ruling on the attorney fee contract.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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